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APR 20 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1564

JOSEPH LONEWOLF, Appellant,

v.

THERESA REY LONEWOLF, Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellee moves to dismiss the appeal or to affirm the judgment of the Supreme Court of New Mexico because the appeal is not within the Court's appellate jurisdiction. Additionally, appellee moves to dismiss or affirm because the appeal does not present a substantial federal question which was properly raised and passed on below and because the appeal is from a decision which rests on an adequate state-law basis. All of appellee's grounds make the questions presented so insubstantial as not to need further argument.

I.

THE NATURE OF THE CASE

Mr. Lonewolf, a member of the Santa Clara Pueblo, and Mrs. Lonewolf, a non-Indian, married over 30 years ago pursuant to a license from the State of New Mexico and not pursuant to tribal law.

For twenty years they lived on non-Indian lands. In 1972 they moved to Santa Clara Pueblo. In 1979 Mrs. Lonewolf petitioned for legal separation in the New Mexico district court. After the separation Mrs. Lonewolf moved from the pueblo and resided in New Mexico.

Mr. Lonewolf answered the separation petition, and he counterclaimed for dissolution of marriage.

Mr. Lonewolf admitted the jurisdiction of the district court to grant the divorce but contested the jurisdiction of the district court to divide the couple's real and personal property. After hearings on the issue of jurisdiction, the district court agreed it had no jurisdiction over the couple's real property. The court retained jurisdiction over the personal property.

Mr. Lonewolf then stipulated to the disposition of various items of personal

property including numerous items identified as community property. Pursuant to this stipulation Mr. Lonewolf identified personal property valued at over $280,000 as community property. Mr. Lonewolf also agreed to the distribution of this property. The stipulation provided that each party had the active advice of counsel and opportunity to make full inquiry into the community property of the parties.

The parties did not agree to the distribution of certain pieces of pottery. After a hearing, the district court determined that Mr. Lonewolf owed Mrs. Lonewolf $18,309. This amount represented one-half the value of the pottery less various deductions in Mr. Lonewolf's favor.

After entry of judgment a writ of garnishment was executed against Mr. Lonewolf and the Valley National Bank,

which is not located on Santa Clara Pueblo, to garnish Mr. Lonewolf's account for the amount of the judgment. Mr. Lonewolf then stipulated to dissolve the writ and to deposit $20,139.90 with the district court.

On appeal the New Mexico Supreme Court affirmed the trial court's judgment.

II.

ARGUMENT

A. This Court Does Not Have Appellate Jurisdiction Over This Case.

The appellate jurisdiction of this Court depends upon the validity of a federal or state statute being drawn in question. This Court has no appellate jurisdiction unless the appellant presented to the state court the federal question raised in this Court. Cardinale v. Louisiana, 349 U.S. 437, 438 (1969).

On appeal to this Court the appellant asserts that various New Mexico statutes conflict with federal legislation governing Indian jurisdiction. On appeal to the state supreme court the appellant did not even cite the state statutes which he now urges are invalid.

Appellant's sole statutory argument in the state supreme court was that the trial court's decision essentially found him to have committed a crime, taking the missing pottery. Appellant further argued the state court had no jurisdiction because his asserted crime was committed on Indian country. Under 18 USC §§ 1151-1153 (1976 & Supp. V 1981) and 25 U.S.C. § 1321 (1976), state courts have no criminal jurisdiction over crimes committed on Indian lands. Appellant abandons this question before this Court, and he raises new statutory arguments never presented below.

At most, ancillary to his criminal conduct argument, the appellant below argued that exercise of jurisdiction over personal property infringed on rights of Indians to self-government. Because appellant chose to raise his issue in this manner, the decision below amounts to a denial of his asserted federal rights and not a validation of state statutes or an invalidation of federal statutes. Mergenthaler Linotype Co. v. Davis, 251 U.S. 256 (1920). Therefore, an appeal does not lie from the decision below.

For these reasons, the appeal should be dismissed.

B. There Is No Substantial Federal Question Presented By The Facts Of This Case.

Appellant's jurisdictional statement repeatedly emphasizes the exclusive jurisdiction of tribes over family relationships and marriage. The appellant

fails to explain how the issue relates to his case. Appellant himself asked for the divorce. Throughout the state court proceedings the appellant conceded the jurisdiction of the state court to dissolve the marital relationship. Thus, whatever the abstract validity of appellant's references to the importance of marriage and family to Indian self-government, appellant may not urge this ground as a basis for invalidating the decision below.

Appellant also urges that application of New Mexico community property principles infringes the authority of Santa Clara Pueblo to make their own laws and be governed by them. New Mexico law requires that a person challenging jurisdiction bear the burden of proving the lack of jurisdiction. State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App. 1974). Under this rule Mr.

Lonewolf was required to show that application of community property principles to personal property would infringe on or conflict with Santa Clara law. Tenorio v. Tenorio, 44 N.M. 89, 98 P.2d 838 (1940). Mr. Lonewolf failed to make any showing of how Santa Clara law treated marital personal property or that application of community property laws would conflict with Santa Clara law. In fact, during argument appellant's counsel conceded that he did not know what was Santa Clara's law on marital property. For this reason, as a matter of state procedural law the decision below was correct.

Appellant would have this Court believe that the decision below involved awarding Mrs. Lonewolf ownership of property located on pueblo lands. The facts belie this argument. At no point did the district court award Mrs. Lonewolf

ownership of property located on pueblo lands. The district court awarded a money judgment to Mrs. Lonewolf which represented half the value of property which had previously been on pueblo lands. The money judgment, moreover, could be satisfied by monies held in a bank located off the pueblo.

As a matter of jurisdiction, when a court has jurisdiction over a divorce and personal jurisdiction over the parties, the court may divide personal property even if the personal property is located outside the boundaries of the state. The situs of personal property is the domicile of the owner. Campbell v. Campbell, 586 S.W.2d 162 (Tex. Civ. App. 1979), withdrawn as moot, 613 S.W.2d 236 (1980). Mrs. Lonewolf's domicile when the district judge determined her ownership interests was New Mexico, not Santa Clara Pueblo.

The interest adjudicated below was not the ownership of particular items of property located on the reservation. The interest adjudicated was Mrs. Lonewolf's personal property right to retain the value of property and that value was represented by monies held by appellant outside the pueblo lands.

Appellant offers no basis for distinguishing between the property distributed under a court order which incorporated the parties' stipulation and the property about which appellant now complains. From the record there appears no basis for appellant's choice to concede jurisdiction for some items of community personalty but to contest it as to the value of other items of property with identical characteristics. New Mexico has long recognized the rights of

Indians to avail themselves of state courts to adjudicate rights against non-Indians. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966). Mr. Lonewolf took advantage of this right to obtain the divorce he requested. Mr. Lonewolf stipulated to the power of the court to divide certain items of personal property identified as community property. In view of Mr. Lonewolf's willingness to use the state court to end his marital relationship and to distribute some community personal property, Mr. Lonewolf should not be allowed to contest the jurisdiction to award the value of other personal property to Mrs. Lonewolf.

CONCLUSION

The questions presented by appellant in this Court were never presented to the state supreme court. Consequently

this Court does not have appellate jurisdiction in this case. Moreover, the questions presented when viewed in light of the facts of this case are so insubstantial as not to need further argument, and the appeal should be dismissed. Alternatively, the judgment of the New Mexico Supreme Court should be affirmed. Additionally, appellee should be awarded her attorney fees, recoverable under state law, and costs, if any, pursuant to Supreme Court Rule 50 and 28 U.S.C. § 2103 (1976).

Respectfully submitted,

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